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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 75

WILMETTE PARK DISTRICT, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 25-27, 41-44) are reported at 76 F. Supp. 924. The opinion of the Court of Appeals (R. 63-69) is reported at 172 F. 2d 885.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1949. (R. 69.) Petition for re-

hearing was denied March 18, 1949. (R. 70.) The petition for a writ of certiorari was filed May 18, 1949, and granted on June 20, 1949. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether the amounts received by petitioner from its bathing beach patrons were amounts paid "for admission" within the meaning of Section 1700 (a) (1) of the Internal Revenue Code.

2. Whether Section 1700 (a) (1) of the Code should be construed as exempting from tax the admission charges received by a state instrumentality.

3. Whether the doctrine of state immunity from federal taxation is a constitutional barrier to collection of tax on the admissions received by petitioner from its bathing beach patrons.

4. Whether the amount of the tax due for the years 1942, 1943 and 1944 was properly collected from petitioner under Section 1718 of the Code as penalties for failure to collect the tax from its bathing beach patrons during those years.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 37-44.

STATEMENT

The essential facts found by the District Court (R. 41-44), taken principally from the stipulation of facts (R. 11-14), are as follows:

Petitioner, the Wilmette Park District, is a body politic and corporate organized in 1908 under the provisions of a statute of the State of Illinois approved June 24, 1895, entitled "An Act to provide for the Organization of Park Districts and the transfer of submerged lands to those bordering on navigable bodies of water" (Illinois Revised Statutes (1945), c. 105, pars. 256 through 295). Pursuant to the provisions of such statute, petitioner is administered by a Board of Commissioners elected by the people residing in the District. The respondent, Nigel D. Campbell, has been the Collector of Internal Revenue for the First District of Illinois since January 1, 1945. (R. 41.)

The Wilmette Park District consists of an area of approximately 2.8 square miles located within the incorporated area of the Village of Wilmette, Cook County, Illinois, a village which has a population of approximately 20,000 and was organized and exists under and by virtue of Chapter 24 of the Illinois statutes. Included within the Wilmette Park District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washington Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain. (R. 41-42.)

For more than 25 years, petitioner's riparian property at the north end of Washington Park and

along the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months. The bathing beach is controlled, maintained and operated solely by petitioner. It is used principally by residents of the Wilmette Park District, but its facilities are also utilized by nonresidents. (R. 42.) During the years 1941 through 1944, petitioner supplied the following services and facilities for use in conjunction with the bathing beach: A bath house containing clothing lockers, toilets and wash rooms; an automobile parking area; life saving equipment; flood lighting, drinking fountains; showers; spectator benches; bicycle racks; first aid personnel; and supplies. In connection with the operation and maintenance of the bathing beach, petitioner employs a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen. (R. 42.)

Petitioner makes two types of charges to users of the beach and beach facilities: (1) a flat rate for a season ticket issued on either an individual or family basis, and (2) a single daily admission charge of 50 cents on week days and $1 on Saturdays, Sundays and holidays, for which no tickets are issued. The charge made by petitioner for the use of the beach and beach facilities is made to cover maintenance, operation and some capital improvements. Over the years the charge is intended merely to approximate these costs, and not to pro-

duce net income or profit to petitioner. (R. 42-43.)

From Gary, Indiana, to Lake Bluff, Illinois, there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois, there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which nine charge admissions and six are operated by hotels and clubs, for the use of their patrons, residents, and members, without any express or specific admission charge. (R. 43.)

On July 24, 1941, the Collector of Internal Revenue notified petitioner to collect an admission tax of 10 percent on all bathing beach tickets sold on and after July 25, 1941. Petitioner did not, during the year 1941 or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act.[1] (R. 43.)

Subsequently, the Commissioner of Internal Revenue assessed and collected from petitioner, under the provisions of Sections 1700 and 1718 of the Internal Revenue Code, penalties in the amount of the tax on the amounts paid as admissions to petitioner's bathing beach from July 25, 1941, to

[1] A stipulation filed in the Court of Appeals on February 2, 1949 (R. 62), states that—

> the Wilmette Park District did not during the years 1942, 1943, 1944 or 1945 collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U.S.C.A., Sec. 1700).

October 1, 1941, and during the years 1942 through 1945, with interest. Petitioner filed timely claims for refund, which were rejected, and this suit was begun. (R. 43-44.)

The District Court entered judgment in favor of petitioner for refund of the tax paid.[2] (R. 45.) The Court of Appeals for the Seventh Circuit reversed. (R. 63-69.)

SUMMARY OF ARGUMENT

1. Section 1700 (a) (1) of the Internal Revenue Code imposes a tax upon "the amount paid for admission to any place." Petitioner charged all persons for admission to its bathing beach and the tax involved here was on amounts paid for admission to the beach. The charge made by petitioner was therefore an admission charge and not, as petitioner contends, a charge for use of bathing beach facilities. The fact that the admission charge entitled patrons to use the beach facilities is immaterial under long-standing Treasury Regulations which recognize that an admission charge may include use of a place or of the facilities in it and which distinguish between an admission charge and a use charge, or amount paid for rental of property or services. Since Congress has not amended the statutory language, the interpretation thereof contained in the Treasury Regulations must be

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[2] The judgment did not include refund of the amount of tax paid for 1941, that amount having been paid to respondent's predecessor. (R. 26.)

taken to be correct. The fact that petitioner did not operate the beach for profit in the ordinary sense does not of course change the nature of the charge made by petitioner.

2. The admission fees received by petitioner are not exempt from tax under Section 1700 (a)(1) on the ground that Congress did not intend the tax to apply to admissions charged by state instrumentalities. It is immaterial that the statute does not specifically state that it applies to admissions charged by States and state instrumentalities. The statute imposes the tax on admissions paid "to any place." This Court has consistently applied the rule that States and state instrumentalities are included within the broad language of a taxing statute. No affirmative intent to exclude them from the operation of Section 1700 (a)(1) can be drawn from the fact that prior to 1941 an exemption was provided for admissions the proceeds of which inured to the exclusive benefit of a society or organization conducted for the sole purpose of improving any city, village or other municipality. That exemption was repealed in 1941 and is not applicable to the taxable years involved here. Moreover, petitioner is not a society or organization; it is a state instrumentality and the Congressional intent with respect to state instrumentalities, including municipalities and political subdivisions of a State, is clear. The Treasury Regu-

lations interpreting the taxing statute have since 1919 provided that admissions charged by States, municipalities, political subdivisions of a State, etc., are not exempt from tax. Since Congress has not amended the statutory language, this interpretation, like that as to the nature of an admission charge, must be taken to have received Congressional approval.

3. The doctrine of State immunity from federal taxation is not a constitutional barrier to the collection of tax on the admissions charged by petitioner. At most, the immunity doctrine applies only if (1) the tax is imposed with respect to an activity which is of an immune type and if (2) the tax also imposes an undue burden upon petitioner.

(a) The tax does not impose an undue burden upon petitioner, and that fact is a complete answer to petitioner's constitutional arguments. An undue burden is one which is actual, substantial and tangible, as distinguished from conjectural, uncertain, remote, indirect or incidental. The admission tax is laid upon the persons paying the admissions, not on petitioner. The tax affects petitioner only in that, because of the resulting increase in cost of admission to the bathing beach, there is a remote possibility that petitioner's revenue from the beach will be reduced and, because of that, increase petitioner's cost of operating the beach. The possibility of increased cost to peti-

tioner is not a constitutionally prohibited burden under decisions of this Court.

(b) If the tax be regarded as imposing a direct burden upon petitioner, the immunity doctrine still does not apply. A direct federal tax may be imposed upon a State in connection with an activity which is of a type not immune from federal taxation because of its nature. Petitioner's operation of the bathing beach was not an immune activity. The activity constituted a business—that of furnishing bathing beach facilities for an admission fee. The business is one which may be and is extensively carried on by private individuals. It is not a business whose conduct is uniquely or traditionally a state function or is necessary to the preservation of a State. To grant it immunity would be to withdraw a taxable activity from the reach of federal taxation. No such result is required by the decisions of this Court. It is immaterial that the State may have deemed the activity one conducted for the public benefit or that it was conducted from a public park and not for profit in the ordinary sense.

Petitioner's argument on this point rests on the erroneous assumption that the activity involved consists of the maintenance of public parks. True, the proceeds from the business were devoted to the maintenance of the bathing beach, but that fact is immaterial and does not in any event change the nature of the activity.

4. The fact that petitioner is a state instrumentality does not relieve it from paying the amount of the tax for the years 1942, 1943 and 1944 as a penalty imposed by Section 1718 of the Code for willful failure to collect the tax from its bathing beach patrons. The imposition of the tax as applied to the admissions petitioner received from its bathing beach patrons was a valid exercise of the taxing power of the Federal Government. The provisions for enforcement of the tax—including the requirement that the tax be collected by the person receiving the admissions and the imposition of a penalty in the amount of the tax for willful failure to collect the tax—are means appropriately adapted to enforce the collection of the tax. Petitioner points to no constitutional provision or implication to justify a conclusion that state sovereignty transcends the enforcement of a valid federal tax. The Tenth Amendment does not support such a conclusion. The laws enacted by Congress within a granted power are the supreme law of the land and the sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution. Moreover, since the operation of the bathing beach was not an activity which is immune from federal taxation, petitioner would not be exempt from payment of the penalty provided by Section 1718 even if the penalty were treated as an admission tax imposed directly upon the State.

ARGUMENT

I

The tax was collected on amounts paid to petitioner "for admission" within the meaning of Section 1700(a)(1) of the Internal Revenue Code

Section 1700(a)(1) of the Internal Revenue Code (Appendix, *infra*, p. 37) imposes a tax upon "the amount paid for admission to any place, including admission by season ticket or subscription * * *." The pertinent Treasury Regulations state that the word "admission" means the right or privilege to enter into a place and that "place" implies the idea of a definite inclosure or location. Treasury Regulations 43 (1941 ed.), Secs. 101.2 and 101.3, Appendix, *infra*, pp. 40-43. In the present case it was stipulated that petitioner "makes a charge to all persons for admission to the bathing beach" (par. 8, R. 12) and that the tax assessed by the Commissioner and paid by petitioner for the years 1942, 1943 and 1944 was "on the amounts pair as admissions to the bathing beach" (par. 16, R. 14).[3] Thus, as the court below held (R. 65), the tax here involved was paid upon amounts which were clearly received as "admission" charges within the meaning of Section 1700(a)(1) and of the pertinent Treasury Regulations.

Petitioner seems to contend that the tax imposed by Section 1700(a)(1) should be limited in its ap-

[3] Tax in the amount of $57.20 on amounts paid as admissions after July 25, 1941, was paid to respondent's predecessor in office and for that reason is not involved here. (R. 26.)

plication to charges for entry to places furnishing entertainment to be seen or heard—that a charge for entry to a place which is subject to use, such as a bathing beach or swimming pool, is a use charge and therefore not taxable under Section 1700(a)(1).[4] (Br. 9-17.) The statute, however, imposes the tax upon the amount paid for admission to "any" place.[5] The fact that the place can be used by persons paying the admission charge does not transform the charge into a use charge. See *Exmoor Country Club* v. *United States*, 119 F. 2d 961 (C.A. 7th); *Twin Falls Natatorium* v. *United States*, 22 F. 2d 308 (D. Idaho); see also, *Chimney Rock Co.* v. *United States*, 63 C. Cls. 660, certiorari denied, 275 U. S. 552. Use of the place or of facilities contained in a place to which admission is charged is generally included to some extent in any admission charge. For example, a theatre patron paying an admission charge will ordinarily sit in a seat provided by the management. A person paying an admission charge to a swimming pool will

[4] As both the District Court and the court below noted (R. 26, 66), petitioner did not originally contend that the charge was not for admission to the bathing beach. Petitioner's amended complaint sought recovery of the tax only on constitutional grounds (R. 6) and referred to "The fee charged by plaintiff for admission to the bathing beach," to the "admissions" collected, and twice to the "admission tickets" sold by petitioner (R. 5). However, both the District Court and court below passed upon the question whether the charge made by petitioner was a charge for admission. The court below held that it was (R. 65-66), whereas the District Court had held that it was not (R. 26).

[5] The tax thus applies as well to fees incident to admission to national parks. See Sec. 541(c), Revenue Act of 1941, c. 412, 55 Stat. 687.

both enter and use the pool at the same time. Ever since the tax upon amounts paid for admission "to any place" was first imposed in 1917,[6] the pertinent Treasury Regulations have recognized that an admission charge within the meaning of the statute may include use of the place or of facilities contained therein. The Regulations have also drawn a distinction between a use charge, or rental for property or services, and an admission charge. Generally speaking, the distinction was based on whether the charge was made to *all* persons. If made to all persons for the right or privilege of entering a definite location, the charge was regarded as an admission charge, as it clearly is; if made only for rental of property or services, with persons who did not use the property or services being accorded free access to the place, the charge was deemed to be one for the rental of property or services and not covered by the statute.[7] This in-

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[6] The tax was first imposed by Section 700 of the Revenue Act of 1917 (c. 63, 40 Stat. 300), and was continued in Section 800 (a) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057) and of 1921 (c. 136, 42 Stat. 227); Section 500 (a) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and of 1926 (c. 27, 44 Stat. 9); and Section 1700 (a) of the Internal Revenue Code.

[7] Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Arts. 5, 8, 9 and 10; Treasury Regulations 43 (1922, 1924 and 1926 eds. (Part 1)), Arts. 2, 3 and 4; Treasury Regulations 43 (1928 and 1932 eds.), Arts. 2 and 3; Treasury Regulations 43 (1941 ed.), Secs. 101.2 and 101.3, Appendix, *infra*, pp. 40-43. Even the very first Treasury Regulations on the subject, Treasury Regulations 43 (1918 ed.), which were not as detailed as those which followed, stated in Article IV that—

> The test, therefore, to determine whether the tax is due on admissions is whether all persons admitted must pay a charge or only those who use the equipment.

terpretation of the statutory language must be taken as correct, for it may be presumed that Congress would have amended the statutory language had it intended a different interpretation. *Helvering* v. *Winmill*, 305 U. S. 79, 83. Accordingly, the question whether a charge is for admission or is a use or rental charge depends upon the facts of the particular case.[8] No charge for rental of property or services is involved in the present case. The charge made by petitioner was made to all persons for admission to the beach without reduction in the charge if the person admitted did not make use of any or all of the property and services furnished by petitioner. Accordingly, the charge was necessarily an admission charge.[9] See Sec. 101.2, Treasury Regulations 43 (Appendix, *infra*, pp. 40-43).

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[8] For this reason it is futile for petitioner to assimilate its charge for admission to its bathing beach to other types of charges which are not taxed. The charge for use of a tennis court, for example, is not taxed because it is a rental charge, being paid for the exclusive use of the court for a limited time. See Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Art 10; Treasury Regulations 43 (1922 and 1924 eds. (Part 1)), Art. 4; Treasury Regulations 43 (1926 ed. (Part 1)), Art. 3.

[9] Analogously, the following have been specifically recognized in prior Treasury Regulations as charges for admission: The charge for admission to a swimming pool or to a building or enclosure in which a swimming pool is located (Treasury Regulations 43 (1919 ed.), Art. 10; Treasury Regulations 43 (1924 ed. (Part 1)), Art. 4; Treasury Regulations 43 (1926 ed. (Part 1)), Art. 3; the charge for admission to a roller skating or ice skating rink (Treasury Regulations 43 (1919 ed.), Art. 10; Treasury Regulations 43 (1922 and 1924 eds. (Part 1)), Art. 4; Treasury Regulations 43 (1926 ed. (Part 1)), Art. 3; the charge for going out on a fishing pier where the charge covers use of fishing tackle but must be paid whether or not the fishing tackle is used (Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Art. 10; Treasury Regulations 43 (1922 and

Petitioner also seems to contend that the charge it made was not an admission charge because petitioner had no profit motive in making the charge. (Br. 11-12.) The District Court adopted a similar view, stating that, while the charge to a public bathing beach operated for profit would be a charge for admission within the meaning of Section 1700, petitioner was in fact levying a use tax in making a charge which brought in approximately enough revenue to cover the cost of operation.[10] (R. 26.) The court below correctly rejected that view. The nature of a charge depends upon what is offered to and received by the patron in return for payment of the charge, not upon the motive for making the charge. The pertinent Treasury Regulations state that "The tax applies whether any profit is contemplated or realized and whether the affair to which admission is charged is public or private." Treasury Regulations 43 (1941 ed.), Sec. 101.4, Ap-

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1924 eds. (Part 1)), Art. 4; and the single price charge for admission to a dancing school where anyone admitted may dance and receive instruction without further charge (Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Art. 10).

[10] We do not understand petitioner to contend that the charge it made was a use "tax." In any event it was not. A tax is a demand of sovereignty (*Case of the State Freight Tax*, 15 Wall. 232, 278) and a use tax is an excise tax levied upon the exercise of the privilege of enjoying one's own property, not the property of another (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 330). Hence, a charge made for the use of public property or services, paid voluntarily by those who avail themselves thereof, is not a tax. See *Carson* v. *Brockton Sewerage Commission*, 182 U. S. 398, 402-403; *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288, 294; *Packet Co.* v. *Keokuk*, 95 U. S. 80, 84; *Mahler* v. *Commissioner*, 119 F. 2d 869, 873 (C.A. 2d); *Wagner* v. *City of Rock Island*, 61 Ill. App. 583.

pendix, *infra*, pp. 43-44. The decisions are in accord. See *Exmoor Country Club* v. *United States*, 119 F. 2d 961 (C.A. 7th); *Dashow* v. *Harrison* (N.D. Ill.), decided February 8, 1946, unreported (1946 P-H, par. 72,405).

II

Section 1700(a)(1) is not to be construed as exempting from tax admission charges made by a state instrumentality

Petitioner further contends that Section 1700 (a)(1) should be construed as exempting from tax admissions charged by a state instrumentality. (Br. 13-17.) This contention, advanced for the first time on petition for a writ of certiorari, is based on an argument that Congress would have explicitly so stated if it had intended to include state functions as subject to tax. (Br. 13.)

Taxpayer's contention cannot be accepted as a rule of construction. As Mr. Justice Rutledge recognized in his concurring opinion in *New York* v. *United States*, 326 U. S. 572, where he favored such a rule of construction, this Court has consistently applied the contrary rule that States are included under the general wording of a tax statute. See also *Case* v. *Bowles*, 327 U. S. 92, 98-99. Although the point was not raised, the latter rule was applied in *Allen* v. *Regents*, 304 U. S. 439, in which the admission tax was held applicable to admissions to football games conducted by a state instrumentality. Cf. G.C.M. 14407, XIV-1 Cum. Bull. 103 (1935).

Petitioner also argues that a Congressional intent not to tax admissions charged by municipalities is to be drawn from the fact that prior to 1941 an exemption from the admission tax was provided for admissions all of the proceeds of which inured to the exclusive benefit of a society or organization conducted for the sole purpose of improving any city, village or municipality. (Br. 14-16.) This exemption was repealed in 1941 (see Sections 541 (b) and 550 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687) and was not applicable to the taxable years involved here. Moreover, since it related only to societies and organizations, it cannot be taken to reflect a Congressional intent to exclude States, state instrumentalities, municipalities, etc., from the operation of Section 1700 (a)(1).

The Congressional intent not to exempt admissions charged by States, state instrumentalities, municipalities and political subdivisions of a State is clear. Section 1700 (a)(1) imposes the admission tax on admissions charged "to any place". As already shown (*supra*, p. 13), tax on amounts paid for admission "to any place" was first imposed under the Revenue Act of 1917, and was continued under the Revenue Act of 1918, subsequent Revenue Acts and the Internal Revenue Code. The pertinent Treasury Regulations issued in 1919 (Treasury Regulations 43 (1919 ed.), Art. 42) stated as follows:

> Art. 42. *Admissions charged by State or municipality not exempt.*—The fact that the

authority charging admissions, or receiving the exclusive proceeds thereof, is one of the United States, or a political subdivision thereof, or a municipality, or a State or municipal institution does not make such admissions exempt from tax. Unless exempt on some other ground such admissions are taxable. For, as the Revenue Act of 1918 provides no exemption for such cases, the only basis for such an exemption of admissions charged by public authorities would be the unconstitutionality of legislation taxing a State or its governmental functions. The taxes imposed by section 800 (a)(1), (2), (5), and (6), however, are imposed on the individuals paying for admission, being admitted, or having the right to the use of a box or seat, respectively. These taxes can not be passed on by such individuals to the authority charging admissions to the place, nor can these taxes in any other way directly reduce the proceeds of such admissions. As the taxes are not imposed on, and do not directly reduce the proceeds inuring to, the authority charging admissions, where a State happens to be that authority, they are not taxes on a State. There can be, therefore, no exemption on that ground.

All of the pertinent Treasury Regulations since 1919 have contained similar provisions.[11] In ad-

[11] Treasury Regulations 43 (1921 ed. (Part 1)), Art. 42; Treasury Regulations 43 (1922, 1924 and 1926 eds. (Part 1)), Art. 26; Treasury Regulations 43 (1928 and 1932 eds.), Art. 24; Treasury Regulations 43 (1940 ed.) Sec. 101.27; Treasury Regulations 43 (1941 ed.), Sec. 101.16, Appendix, *infra*, p. 44.

dition, the admission tax was held in 1938 to apply to admission charges to football games conducted by a state agency. *Allen* v. *Regents*, 304 U. S. 439. In view of the fact that Congress has not amended the statutory language despite its consistent interpretation since 1919 as not exempting admission charges made by state instrumentalities, such an interpretation of the statutory language, like that previously noted in another connection (*supra*, pp. 13-14), must be taken as correctly expressing the Congressional intent. *Helvering* v. *Winmill*, 305 U. S. 79, 83.

III

The doctrine of state immunity from federal taxation is not a constitutional barrier to the collection of tax on the admissions charged by petitioner

It is well established that the doctrine of state immunity from federal taxation does not prevent the imposition of all taxes in connection with a state activity. At most, the doctrine affords immunity from tax only if (1) the tax is imposed in connection with a state activity which is immune from federal taxation and (2) the imposition of the tax unduly burdens the state activity. *Helvering* v. *Gerhardt*, 304 U.S. 405, 418, 419-'20, rehearing denied, 305 U. S. 669. As applied to the present case, the admission tax was neither laid upon a state activity which is immune from federal taxation nor did the tax constitute a constitutionally prohibited burden upon a state activity.

A. *The tax may constitutionally be applied to petitioner's operation of the bathing beach irrespective of whether the operation of the beach is an immune activity, for the imposition of the tax does not impose an unconstitutional burden upon petitioner*

Section 1700 (a)(2) of the Code (Appendix, *infra*, p. 37) provides that the admission tax imposed by Section 1700 (a)(1) "shall be paid by the person paying for such admission". When immunity is claimed for a tax on private persons, it must appear that the burden of the tax on the state activity is actual, substantial, and tangible, as distinguished from conjectural, uncertain, remote, indirect or incidental. *Helvering* v. *Gerhardt, supra*, pp. 419-420; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 486; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 386-387; *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 365; *Liggett & Myers Co.* v. *United States*, 299 U. S. 383, 386; *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466; *Alward* v. *Johnson*, 282 U. S. 509, 514. If it be true, as we believe, that the admission tax imposed no undue burden upon petitioner, that fact is a complete answer to petitioner's constitutional argument and it is unnecessary for the Court to decide whether the operation of a bathing beach by petitioner was a state activity which is immune from federal taxation.

Petitioner's contention that the admission tax is in the present case an unconstitutional burden on

the operation of a state activity rests on an assertion that the increase in the price of tickets to the bathing beach occasioned by the tax erects a financial barrier between petitioner and the public and frustrates petitioner's objective of providing bathing beach facilities for the use of the general public. (Br. 21-22.) There can be no doubt that the provision requiring payment of the tax by the person paying the admission places the legal incidence, or the first impact, of the tax upon the admittees to petitioner's bathing beach and that petitioner's argument is based upon an asserted secondary impact of the tax. Moreover, it is highly conjectural to assume that attendance at the bathing beach would be diminished by the necessity of paying the admission tax. There is no showing that purchasers of 50-cent single admission tickets are likely to be deterred by the imposition of an additional 5- or 10-cent tax.[12] Similarly, persons desiring to purchase season tickets would not be likely to feel they could not afford the difference between $2 and $2.20 or $2.40. But, in any event, the tax does not create a barrier between the citizen and the benefit the State has undertaken to supply. If a barrier existed at the admission price plus tax, it could be dissipated by a reduction in the price of admission. A reduction in the prices of admission might reduce petitioner's revenue from the bathing beach and in turn

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[12] By Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, the rate of tax was changed from 1 cent for each 10 cents to 1 cent for each 5 cents of the amount paid for admission.

indirectly increase its cost of maintaining the bathing beach. However, the possibility of increased cost to petitioner is not a ground for immunity from tax. *Helvering* v. *Gerhardt,* 304 U. S. 405, 421, and cases there cited; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160. As the Court stated in *Helvering* v. *Gerhardt, supra,* pp. 421-422:

> The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitution immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

The alleged burden of the admission tax on petitioner's operation of the bathing beach is as remote and conjectural as was the sales tax in *Alabama* v. *King & Boozer,* 314 U. S. 1, upon the United

States, and the manufacturer's excise tax in *Liggett & Myers Co.* v. *United States*, 299 U. S. 383, upon the State. It therefore furnishes no basis for immunity from the tax.

B. *Petitioner's operation of the bathing beach is not a state activity which is immune from federal taxation*

Assuming that the admission tax imposed a direct burden upon petitioner, it does not necessarily follow that the tax is constitutionally uncollectible. A federal tax may be imposed directly upon a State or a state instrumentality provided the activity with respect to which it is imposed is not of a type which is constitutionally immune from federal tax. Under the decisions of this Court, petitioner's operation of the bathing beach was not an immune activity.

The most pertinent decision is *Allen* v. *Regents*, 304 U. S. 439, in which the Court rejected constitutional objections and upheld collection of the admission tax on admissions charged to football games conducted by the Regents of the University System of Georgia, an instrumentality of the State having control and management of the University of Georgia and the Georgia School of Technology. The games were a means of procuring substantial aid for the schools' programs of athletics and physical education. (P. 451.) For the purposes of the case, the Court also assumed (pp. 449-450) that the games were an integral part of the program of

public education conducted by the State of Georgia; that public education is a governmental function; and that the tax was imposed directly upon the state activity and directly burdened that activity. Decision was placed upon the nature of the activity. The question in the case was stated to be (p. 451)—

> whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a State may withdraw the business from the field of federal taxation.

In answer, the Court stated (pp. 451-452):

> When a State embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation. * * *
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> * * * If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation.
>
> Under the test laid down in *Helvering* v. *Gerhardt, ante,* p. 405, however essential a system

> of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a non-discriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged.

Reference to "the test laid down ir *Helvering* v. *Gerhardt*" was apparently to the fact that in that case the Court stated (304 U. S. at p. 419) that of the two guiding principles then definitely established by the decisions one—

> dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. * * *

This was evidently a statement of the general principle derived from *South Carolina* v. *United States,* 199 U. S. 437, and *Ohio* v. *Helvering,* 292 U. S. 360, in which the sale of liquor by a State was held not to be an activity immune from federal taxation, and from *Helvering* v. *Powers,* 293 U. S. 214, in which there was a similar holding as to the operation of a street railway by a State. In those cases, as in the *Regents* case, the activity involved consisted of a business which could be carried on by private individuals. In general, in each case immunity was denied because the State had engaged in business.

In the more recent case of *New York* v. *United*

States, 326 U. S. 572, on which petitioner relies (Br. 18), the State of New York claimed immunity from the federal tax on the sale of mineral water as applied to the business of selling mineral water conducted by the State. The claim of immunity was rejected and the tax sustained in two opinions—one written by Mr. Justice Frankfurter, who was joined by Mr. Justice Rutledge, and one written by Mr. Chief Justice Stone, who was joined by Mr. Justice Reed, Mr. Justice Murphy, and Mr. Justice Burton. Both opinions assumed the correctness of the decisions in the *Regents, South Carolina, Ohio,* and *Powers* cases (326 U. S. at pp. 574-575, 586, 589) and, as Mr. Justice Frankfurter stated before pointing to those decisions (p. 574), "On the basis of authority the case is quickly disposed of."

The opinions consist, for the most part, of delineations of the general test of immunity. Mr. Justice Frankfurter's opinion states that a State is not immune from a nondiscriminatory federal tax exacted from private persons upon the same subject matter. Under that test, according to the opinion, a State would be accorded immunity only for a discriminatory tax—a tax upon the State "as a State" (p. 582)—consisting of a tax imposed upon a state activity or state-owned property that partakes of uniqueness from the point of view of intergovernmental relations. Mr. Chief Justice Stone and those who joined with him were apparently not prepared to go so far. In their opinion there could be

a federal tax which is not discriminatory as to subject matter, being laid equally upon individuals and the State alike, which would nevertheless interfere unduly with the State's performance of its sovereign functions of Government merely because it is the State that is being taxed. As we interpret their opinion, it holds that immunity should be denied if to grant it would result in withdrawing taxable property or activities from the reach of federal taxation. In rejecting the State's claim of immunity, these Justices stated (pp. 588-590) that application of the federal tax on the sale of mineral water did not curtail the business of the State any more than it did the like business of citizens; that the withdrawal from the reach of such a nondiscriminatory tax is itself an impairment of the taxing power of the Federal Government; that the activity taxed is such that its taxation does not unduly impair the State's functions of government; and that (p. 589):

> The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524. The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it. *Helvering* v. *Powers, supra*, 225; *Ohio* v. *Helvering, supra*; *South Carolina* v. *United States, supra*, and see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States, supra*.

The opinions of both Mr. Justice Frankfurter and Mr. Chief Justice Stone abandoned the distinction between "governmental" and "proprietary" activities on which the previous decisions had rested to some extent. (Pp. 583, 586.) The decisive fact, for present purposes, is that under both opinions a State is subject to a nondiscriminatory federal tax on a business carried on by it which is not uniquely an activity of a State or one which has been traditionally outside the federal taxing power and thus, in the language of *Helvering* v. *Gerhardt*, 304 U. 405, 419, is not essential to the preservation of the State government.

By operating a bathing beach to which it charged admission, petitioner engaged in the business of furnishing bathing facilities for an admission fee. That business is of a type which has been, and even in the vicinity of petitioner's beach still is, carried on by private individuals.[13] It has not even been shown that petitioner charged a smaller admission fee than was charged at privately owned bathing beaches.[14] The maintenance of parks containing

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[13] It was stipulated that (R. 13):

> From South Chicago to Highland Park, Illinois there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which 9 charge admissions and 6 are operated by hotels and clubs for the use of their patrons, residents and members without any express or specific admission charge.

[14] It was stipulated that petitioner charged a single daily admission of 50 cents for weekdays and $1 for Saturdays, Sundays and holidays. (R. 12.) Season tickets were also issued. In 1943 a single season ticket was $1.50 and a family ticket $4, and in 1946 the prices were $2 and $5, respectively. (Ex. 1 opposite R. 14.)

bathing beaches is no doubt properly within the authority of the State under the State Constitution, and it may be assumed that the maintenance of public parks is an essential governmental function. But the fact that this bathing beach was operated within a public park area does not make the business of operating the bathing beach immune from tax any more than was the sale of mineral water from a public park involved in the *New York* case. The operation of a bathing beach under circumstances and conditions whereby the State offers the facilities of the beach to the public for the payment of an admission fee in the same manner as any beach operated by private persons for profit is not an activity which is uniquely or traditionally a state function or is necessary to the preservation of the State. That the bathing beach was provided in the interests of the general health and welfare of the public may be assumed, but it does not follow that it is thereby rendered immune from federal taxation. The general health and welfare were also related to the State sale of liquor involved in the *South Carolina* and *Ohio* cases and to the State's conduct of athletic exhibitions involved in the *Regents* case, both of which were held to be activities not immune from federal tax. As the Court stated in the *Powers* case (p. 225):

> The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. * * *

Petitioner's argument is predicated upon the assumption that the activity taxed consists of the noncommercial activity of maintaining public parks.[15] (Br. 18-20.) Petitioner confuses the activity with the purpose to which the proceeds from it are devoted. Petitioner's activity and business was in furnishing bathing facilities for an admission fee—an activity which, unlike the furnishing of public schools for example, is not uniquely or traditionally a state function even when conducted within a public park. The nature of petitioner's activity and business was not changed by the fact that petitioner devoted the proceeds therefrom to the maintenance of the bathing beach. Nor does the purpose to which the proceeds were devoted have any bearing on the immunity question. This is illustrated by the *Regents* case, where the conduct of football games by a state instrumentality was held to be a non-immune "business" even though the conduct of the games was assumed to be an integral part of the State's program of public edu-

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[15] In the *New York* case, Mr. Chief Justice Stone's opinion stated (pp. 587-588):

> A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed. * * *

Such exclusions from federal tax would result because the property and income involved would be that uniquely and traditionally capable of being owned and earned by a State.

cation and even though the proceeds from the games were devoted to public education. Similarly, in the *New York* case the profits from the State's sale of mineral water were used to defray the expenses of a state health resort.

As already shown, if a State enters into an activity or business designed to obtain proceeds for the maintenance of a project or projects deemed to be for the public benefit or even for a traditionally governmental use, the State is not immune from federal tax so long as the business or activity is not itself the type of sovereign activity which requires preservation from interference by the Federal Government. The State cannot withdraw activities from the reach of the federal taxing power merely by engaging in such activities. That this is true even though no profit in the ordinary sense is intended is evident from the *Powers* case, where the operation of a street railway by a state instrumentality was not for profit but was nevertheless held not to be an immune activity. Moreover, the State actually realizes a profit from the conduct of any business or activity which produces funds that can be devoted to public benefit projects, since otherwise such projects would have to be financed with tax revenues.

IV

The amount of the tax due for the years 1942, 1943 and 1944 was properly collected from petitioner under Section 1718 of the Code as a penalty for failure to collect the tax from bathing beach patrons

As the person receiving amounts paid as admissions which were subject to tax under Section 1700(a)(1) of the Code, petitioner was required to collect the admission tax from its bathing beach patrons, keep the necessary records, file returns, and pay over the tax collected. Secs. 1715, 1716 and 1720, Internal Revenue Code, Appendix, *infra*, pp. 38-39, 40. For the years involved here—1942, 1943 and 1944— petitioner was given timely written notice to collect the tax from its beach patrons.[16] It did not do so. As a result, the amount of the tax for each of the three years was assessed against petitioner as a penalty pursuant to Section 1718 of the Code (Appendix, *infra*, pp. 39-40), which imposes a penalty in the amount of the tax for, among other things, willful failure to collect the tax.

Petitioner cannot object to payment of the penalties on the ground that they were or will be paid with tax revenues. The penalties for the years involved have been paid; this is a suit for refund. The record does not show with what funds petitioner paid the penalties; the admission receipts, rather than tax revenues, may have been used. It is

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[16] Written notice was received by petitioner on July 24, 1941, to collect an admission tax of 10 percent on all bathing beach tickets sold on and after July 25, 1941. (R. 13.)

in any event immaterial what funds have been or will be used. Petitioner's refusal to collect the admission tax from its beach patrons and use of tax revenues for payment of the penalties cannot change the admission tax on persons paying the admissions to a tax laid by the Federal Government upon the tax revenues of a State. Petitioner's argument on this branch of the case (Br. 28-29) raises only the question whether it, as a state instrumentality, is immune from the penalty under Section 1718 to which a private individual is subject.

The fact that petitioner is a state instrumentality does not relieve it from payment of the penalties imposed by Section 1718. As we have shown, collection of the tax was not restricted by the constitutional immunity of states and state instrumentalities from federal taxation. The imposition of the admission tax as applied to the admissions petitioner received from its bathing beach patrons was a valid exercise of the taxing power of the Federal Government. In order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—Congress has power to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 420; *Case* v. *Bowles*, 327 U. S. 92, 102. The provisions for enforcement of the admission tax—including the requirement that the tax be collected by the person receiving the ad-

missions and the imposition of a penalty in the amount of the tax for willful failure to collect the tax—are means appropriately adapted to enforcement of the tax. See *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 393. Petitioner, in denying their applicability to it as a state instrumentality, is in effect claiming that it may defeat the tax by refusing to collect it. The basis of the claim is not clear, except that petitioner seems to argue that the applicability to it of the provisions for enforcement of the tax interferes with its sovereignty. Petitioner points to no constitutional provision to justify a conclusion that its sovereignty transcends the enforcement of a valid federal tax. The Tenth Amendment does not support such a conclusion. *Case* v. *Bowles, supra,* p. 102, and cases there cited. The laws enacted by Congress within a granted power are the supreme law of the land and "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." *United States* v. *California,* 297 U. S. 175, 184. See also, *Case* v. *Bowles, supra; United States* v. *Darby,* 312 U. S. 100; *California* v. *United States,* 320 U. S. 577; *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 534. Petitioner, as a state instrumentality, therefore has no more right to defeat the admission tax than does a private individual and, like a private individual, is subject to the prescribed penalty for willful failure

to collect the tax from its beach patrons. Cf. *Allen* v. *Regents*, 304 U. S. 439, 448, 456.[17]

Petitioner would not be exempt from payment of the penalties even if the penalties were regarded as an admission tax imposed directly upon the State. As we have previously shown (*supra*, pp. 23-31), petitioner's operation of the bathing beach was an activity or business which is not immune from federal taxation. Since the activity itself is not immune, no immunity would attach to an admission tax laid directly upon the State.

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[17] With respect to mere collection of the tax, the following statements in the *Regents* case, pp. 449-450, are also pertinent:

> For present purposes we assume the truth of the following propositions put forward by the respondent: * * * that the burden of collecting the tax is placed immediately on a state agency. * * * We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.

The requirement by a State that the Federal Government collect a tax would not even be an unconstitutional burden. See *Colorado Bank* v. *Bedford*, 310 U. S. 41, 53.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted,

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NOVEMBER, 1949.

Internal Revenue Code:

SEC. 1700. TAX.

There shall be levied, assessed, collected, and paid—

(a) *Single or Season Ticket; Subscription.*—

(1) *Rate.*—A tax of 1 cent for each 10 cents[18] or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription; * * *

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1700.)

SEC. 1702. PRINTING OF PRICE ON TICKET.

The price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped, or written on the face or back of that part of the ticket which is to be taken up by the management of the theater, opera, or other place of amusement, together with the name of the vendor if sold other than at the ticket office of

[18] Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, changed the rate to 1 cent for each 5 cents or major fraction thereof.

the theater, opera, or other place of amusement.

(26 U. S. C. 1946 ed., Sec. 1702.)

SEC. 1703. PENALTIES.

(a) *Failure to Print Correct Price on Ticket.*—Whoever sells an admission ticket or card on which the name of the vendor and price is not printed, stamped, or written, as provided in section 1702, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100.

(26 U. S. C. 1946 ed., Sec. 1703.)

SEC. 1704. ADMISSION DEFINED.

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor.

(26 U. S. C. 1946 ed., Sec. 1704.)

SEC. 1715. PAYMENT OF TAX.

(a) *Collection by Recipient of Admissions, Dues, and Fees.*—Every person receiving any payments for admissions, dues, or fees, subject to the tax imposed by section 1700 or 1710 shall collect the amount thereof from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 1710.

(b) [As amended by Section 542 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Place of Payment.*—The taxes collected under subsection (a), and the taxes required to be paid under section 1700 (c), (d), or (e), shall be paid to the collector of the district in which the principal office or place of business is located.

(c) *Time of Payment.*—The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time fixed for filing the return.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1715.)

SEC. 1716. RETURNS.

(a) [As amended by Section 542 of the Revenue Act of 1941, *supra*] *Requirement.*—Every person required under subsection (a) of section 1715 to collect the taxes, or required under section 1700 (c), (d), or (e) to pay the taxes, imposed by this chapter shall make returns under oath, in duplicate, in such manner and containing such information as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1716.)

SEC. 1718. PENALTIES.

* * * * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over,

any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1718.)

SEC. 1720. RECORDS, STATEMENTS, AND RETURNS.

Every person liable to any tax imposed by this chapter, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

(26 U. S. C. 1946 ed., Sec. 1720.)

Treasury Regulations 43 (1941 ed.):

Sec. 101.2. *Meaning of "Admission."*—The tax is imposed on "the amount paid for *admission* to any place," and applies to the amount which *must be paid* in order to gain admission to a place. (See section 101.4.) The term "admission" means the right or privilege to enter into a place. The law specifically

provides that it shall also include "seats and tables, reserved or otherwise and other similar accommodations." A charge for their use in any place must, therefore, be treated as a taxable charge for admission. So an amount paid for the right to use a reserved seat in a theater or circus, a seat in a room or window to view a parade, or the like, is taxable. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or is separate and distinct from an admission charge, or is itself the sole charge. The tax under section 1700 (a) as amended does not apply, however, to admissions to or charges for seats and tables in a cabaret, roof garden, or similar place which are subject to the provisions of section 1700 (e) of the Code as amended. (See sections 101.13 and 101.14.)

* * * * *

The amount paid for admission by season ticket is a fixed sum which entitles the holder to admission on definite dates to a series of scheduled attractions, or to admission at all times during the season, and the form of the ticket is not controlling.

* * * * *

An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an "amount paid for admission" even though one of the privileges be the right to enter a clubhouse,

club grounds, gymnasium, swimming pool, or the like. But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount paid for such so-called membership is an "amount paid for admission" within the meaning of the Code. An entirely different tax is levied on amounts paid as initiation fees or as dues or membership fees to certain classes of clubs or organizations, and also upon life members of such clubs, by section 1710 of the Code. (See Subpart F.)

* * * * *

If a charge imposed on a person admitted to a place is designated as an admission it will be presumed that it is in fact an admission charge, even though it includes rental of property or services, such, for example, as a charge of 50 cents for admission to a swimming pool, including use of a suit. The tax will apply in such case unless it is clearly shown that the charge is for rental or services, and that persons who do not use the property or services offered (e.g., use of a swimming suit) are admitted free. On the other hand, the designation of a charge as a rental or service charge (e.g., a charge for use of a swimming suit) will not avoid the application of the tax if it in fact

represents a charge for admission, or includes the right to admission. If the same charge is made to the person using or furnishing his own property or equipment. as where property or equipment is furnished by the management, such charge is an amount paid for admission and subject to tax. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge represents the admission charge.

Sec. 101.3. *Meaning of the Term "Place."*— The tax under section 1700 (a) of the Code is on the amount paid for admission *to any place.* "Place" is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase "to any place," therefore, does not narrow the meaning of the word "admission," except to the extent that it implies that the admission is to a definite inclosure or location. The inclosure or location may be on, above, or beneath the surface of the earth. Places of amusement obviously constitute the most important class of places admission to which is subject to this tax.

Sec. 101.4 *Basis, Rate, and Computation of tax.*— * * *

The tax applies whether any profit is contemplated or realized and whether the affair to which admission is charged is public or private.

* * * * * * *

The amount paid for admission to any place is the amount which must be paid to the person or persons controlling such admission in order to secure the privilege. * * *

Sec. 101.16 [as amended by T. D. 5170, 1942-2 Cum. Bull. 246] *Admissions by or for the Benefit of Federal, State, or Municipal Governments.*—The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. For exception see section 101.15 (b). The Code specifically provides that the taxes on admission shall be paid by the person paying for admission. It is not, therefore, a tax on the person or authority selling the admissions or receiving the proceeds thereof.

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